

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1037

AMERICAN LIBRARY ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES TO BE RAISED

In the November 4, 2003 Report and Order and Further Notice of Proposed Rulemaking (the "Order") that is the subject of Petitioners' request for review, the Federal Communications Commission ("FCC" or "Commission") adopted regulations mandating a "content protection" scheme for digital broadcast television ("DTV"). The regulations permit broadcasters to embed into a digital broadcasting stream a digital code that signals DTV reception equipment that the content being transmitted is subject to restrictions on further redistribution. This digital code is referred to as a "broadcast flag."

Significantly, the regulations require that after July 1, 2005, any device capable of receiving over-the-air DTV broadcasts, including televisions, and personal computers configured for DTV reception, be built to recognize and protect DTV content marked with the flag. Specifically, such devices must (1) check for the presence of the flag; (2) encrypt any flagged

content using “authorized technologies;”¹ (3) allow digital recordings of flagged content using only authorized technologies; and (4) allow further digital transmission of flagged content only via secured digital outputs using authorized technology to other “compliant devices.”²

The Commission cited its “ancillary jurisdiction” under the Communications Act of 1934 (the “Act”), 47 U.S.C. § 151 *et seq.*, as grounds for its authority to impose content redistribution regulations on equipment manufacturers, and recognized that its adoption of the broadcast flag rule constituted the first time it has exercised ancillary jurisdiction over consumer equipment manufacturers in the absence of an explicit grant of authority by Congress.

Key issues in the rulemaking were whether the Commission had statutory authority to impose content redistribution control regulations on the affected equipment manufacturers; whether the Commission has authority to establish a regulatory regime that restricts the copying of copyrighted material; whether the need for content protection rules and the costs and benefits of prescribing the broadcast flag had been adequately established; and whether the broadcast flag is an effective content protection mechanism given its acknowledged weakness as a technological matter.

¹ Delineation of standards for selecting specific “authorized” content protection technologies was made the subject of further rulemaking proceedings. In the interim, the regulations provide for FCC consideration and approval of authorized content protection technologies.

² The regulations promulgated by the FCC are based on a proposal developed by the Broadcast Protection Discussion Group, a sub-group of the Copy Protection Technical Working Group, an informal discussion group comprised of representatives of the entertainment, consumer electronics and information technology industries, as well as some consumer groups. The proposal was presented to the Commission by the Motion Picture Association of America and others. While the proposal was touted to the Commission as the product of an “industry consensus,” the record in the Commission’s rulemaking proceeding reflected the contrary.

The issues to be raised in the petition are:

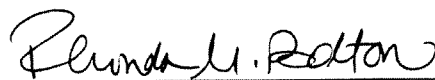
1) Whether the Commission exceeded its statutory authority under the Act by imposing content redistribution control regulations on equipment manufacturers, including without limitation, whether the Commission erred in interpreting the scope of its ancillary jurisdiction under the Act.

2) Whether the Commission exceeded its jurisdiction by establishing a regulatory scheme that restricts the copying of copyrighted content even though the Commission has not been given any such authority by the copyright laws.

3) Whether the Commission's decision to prescribe the broadcast flag and other findings in the proceeding were supported by substantial evidence in the record, including without limitation, evidence of the need for the broadcast flag and its costs and benefits.

3) Whether the Commission acted arbitrarily and capriciously in violation of the Administrative Procedure Act in concluding that the broadcast flag was an appropriate method of DTV broadcast content protection given the acknowledged weakness of broadcast flag technology and the costs and benefits of the broadcast flag.

Respectfully submitted,



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March 3, 2004

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**PROVISIONAL CERTIFICATE AS TO
PARTIES, RULINGS AND RELATED CASES**

In accordance with D.C. Circuit Rule 15 (c)(3), Petitioners American Library Association, Association of Research Libraries, American Association of Law Libraries, Medical Library Association, Special Libraries Association, Consumer Federation of America, Consumers Union, Electronic Frontier Foundation, and Public Knowledge provide the following information:

(A) Parties and Amici

According to Federal Communications Commission records, the parties before the Commission were as follows:

American Antitrust Institute
American Conservative Union, 60 Plus Association, Capital Research Center, Citizens United,
The Conservative Party of New York State, The Patrick Henry Center for Individual
Liberty, and Shirley & Banister Public Affairs (Joint Commenters)
American Foundation for the Blind
American Library Association, Association of Research Libraries, American Association of Law
Libraries, Medical Library Association, Special Libraries Association (Joint
Commenters)
American Society of Composers, Authors & Publishers; Broadcast Music, Inc. (Joint
Commenters)
Arizona Consumers Council, California Public Interest Research Group, Colorado Public Interest
Research Group, Columbia Consumer Education Council, Consumer Assistance Council
(MA), Consumer Federation of America, Democratic Processes Center, Florida
Consumer Action Network, Massachusetts Consumers' Council, North Carolina Public
Interest Research Group, Oregon State Public Interest Research Group, Texas
Consumers' Association, The Consumers' Voice, US Action, and Virginia Citizens'
Consumer Council (Joint Commenters)
Banks Broadcasting, Inc., LIN Television Corp., Midwest Television, Inc., Post-Week Stations,
Inc. and Raycom Media, Inc. (Joint Commenters)
CBS Television Affiliates Association
Center for Democracy and Technology
Computer & Communications Industry Association
Consumer Electronics Association
Corporation for National Research Initiatives
Corporation for Public Broadcasting, The Association of Public Television Stations, and the
Public Broadcasting Service (Joint Commenters)
Digimarc Corporation and Macrovision Corporation (Joint Commenters)
Digital Transmission Licensing Administrator, LLC
Directors Guild of America
DirecTV, Inc.
Electronic Frontier Foundation
Electronic Privacy Information Center
Free Software Foundation
Home Recording Rights Coalition
IBM
Information Technology Association of America
Information Technology Industry Council
International Association of Broadcast Monitors
Internet Commerce Coalition and United States Internet Service Provider Association (Joint
Commenters)
IT Coalition (Business Software Alliance and Computer Systems Policy Project)
Law Office of Adam Hill
Motion Picture Association of America, ABC, ABC Television Affiliates Association,
AFMA, American Association of Advertising Agencies, American Federation of
Television and Radio Artists, American Society of Composers, Authors and Publishers,
Association for Maximum Service Television, Inc., Association of National Advertisers,

Inc., Belo Corp., Broadcast Music, Inc., CBS, Fox Broadcasting Company, International Alliance of Theatrical and Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC, National Association of Broadcasters, Screen Actors Guild, Inc., Writers Guild of America, East, Inc., and Writers Guild of America, West, Inc. (Joint Commenters)

Motorola

National Broadcasting Company

National Cable & Telecommunications Association

National Football League, Office of the Commissioner of Baseball, National Basketball Association, National Hockey League, Women's National Basketball Association, National Collegiate Athletic Association, PGA Tour, Inc., and Ladies Professional Golf Association (Joint Commenters)

National Music Publishers' Association

NBC Television Affiliates Association

New Yorkers for Fair Use

North American Broadcasters Association

Philips Electronics North America

Public Knowledge and Consumers Union (Joint Commenters)

Recording Industry Association of America

Thomson Inc.

TiVo Inc.

Veridian Corporation

Verizon

Viacom

Walt Disney Company and ABC Television Network (Joint Commenters)

Worldcom, Inc.

Thousands of individual consumers also filed comments and reply with the FCC.

The parties before this Court are:

American Library Association (Petitioner)

Association of Research Libraries (Petitioner)

American Association of Law Libraries (Petitioner)

Medical Library Association (Petitioner)

Special Libraries Association (Petitioner)

Consumer Federation of America (Petitioner)

Consumers Union (Petitioner)

Electronic Frontier Foundation (Petitioner)

Public Knowledge (Petitioner)

Federal Communications Commission (Respondent)

United States of America (Respondent)


(B) Ruling Under Review:

In the Matter of Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 03-273, 18 F.C.C.R. 20885 (rel. Oct. 9, 2003).

(C) Related Cases:

There are no related cases in any other United States court of appeals or any other court in the District of Columbia.

Respectfully submitted,



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